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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.V., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

D.V.,

Defendant and Appellant.

G057142

(Super. Ct. No. 16DP1233)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dennis J
Keough, Judge. Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant
and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Aurelio Torre,
Deputies County Counsel, for Plaintiff and Respondent.

No appearance for minor.

* * *

D.V. (Mother) appeals from an order of the juvenile court, terminating her parental rights to her son, A.V., and selecting adoption as his permanent plan. A.V. was detained at the hospital following his birth in November 2016, when methamphetamine was found in his system. He was placed with his current foster parents two months later, and they were granted de facto parent status in January 2018. They now wish to adopt him.

Mother contends the court erred in refusing to apply the parental benefit exception to adoption (Welf. and Inst. Code, § 366.26, subd. (c)(1)(B)(i))¹ because she has maintained consistent visitation with A.V., and the two of them enjoy a warm and loving relationship. We find no error.

The burden is on the parent to justify application of the parental benefit exception to adoption. In order to establish the exception, the parent must show that the relationship with the dependent child is not only loving and enjoyable, but parental in nature. In other words, it must be a relationship of such significance to the child that the benefit of maintaining it would outweigh the benefits of permanency and stability the child would receive from adoption into a permanent family. Such a showing is difficult to make in a case like this, where the child has never spent so much as one night in the parent's care. We therefore find no abuse of discretion in the juvenile court's ruling.

¹ All further statutory references are to the Welfare and Institutions Code.

FACTS

A.V. was born in November 2016, and immediately tested positive for amphetamine. Mother admitted she used cocaine, methamphetamine, and marijuana during her pregnancy and that she used methamphetamine during her labor to ease the pain. Additionally, a criminal records check revealed Mother's prior history of prostitution, petty theft, and drug-related charges.

A hospital hold was placed on A.V. On November 15, 2016, the Orange County Social Services Agency (SSA) filed a juvenile dependency petition asking the court to take jurisdiction over him. The petition alleged jurisdiction was appropriate based on failure to protect (§ 300, subd. (b)) and the lack of any provision for his support (§ 300, subd. (g)). On that same day, the court ordered that A.V. be detained in the custody of SSA.²

A.V. was initially placed in an emergency shelter home. Further testing confirmed his in utero exposure to methamphetamine, and he experienced numerous withdrawal symptoms after birth including jitteriness and excessive eating, sneezing and stooling.

Mother expressed a desire to maintain her sobriety and to reunify with A.V. Thereafter, she visited him regularly while also submitting to random drug testing.

By mid-January 2017, A.V. had been moved to a foster home, and Mother was participating in outpatient drug treatment and slated for individual counseling. The foster mother reported that Mother's visits were going well and that she was loving and affectionate during her visits.

² Mother identified three potential alleged fathers, none of whom claimed paternity. The juvenile court's order terminated the parental rights of all three alleged fathers, and none of them has appealed.

On February 23, 2017, the court held the jurisdictional hearing and found the allegations of the petition to be true. The court declared A.V. to be a dependent of the juvenile court and ordered him removed from parental custody. The court also granted reunification services and visitation to Mother as recommended by SSA.

As of April 2017, SSA reported Mother was performing well with her case plan. Her visitation had been increased from seven hours per week to 10 hours per week, split into two five-hour visits—one supervised and one unsupervised. The social worker hoped to continue increasing visitation with the goal of progressing to overnight visits and ultimately a 60-day trial visit.

However, by the middle of May 2017, Mother's visitation was again restricted to supervised visits as A.V. was experiencing respiratory and skin issues that were consistently exacerbated during unsupervised visits. The social worker was concerned that Mother was exposing him to smoky environments and was using scented oils or lotions on him, despite having been told that his sensitive skin could not tolerate such products.

Although Mother was reported to be generally appropriate and attentive during her supervised visits, it was noted that she sometimes slept for two-to-three hours during her five-hour visits. The social worker also expressed concerns that Mother sometimes brought foods that were not on A.V.'s list of allowed items.

The court held a six-month review hearing in October 2017. SSA reported that Mother was consistently attending her visits, but there were continuing concerns about her ability to respond to A.V.'s needs during those visits. Although Mother continued to test negatively at her random drug tests, SSA recommended that her reunification services be terminated.

The court rejected SSA's recommendation, found that Mother had made substantial progress toward alleviating or mitigating the reasons for the dependency, and extended her reunification services to the 12-month review date in January 2018.

At the 12-month review hearing, SSA reported that Mother had completed her substance abuse treatment program and was continuing to submit negative drug testing results. Her supervised visitation was also going well, and she was showing improved awareness of A.V.'s special needs. In light of that progress, SSA recommended that Mother's reunification services be extended to an 18-month review date.

At the hearing on January 9, A.V.'s foster parents asked to be accorded standing as his de facto parents. Over Mother's objection, the court granted that request. The juvenile court also noted Mother's continued progress and extended her reunification services to June 2018.

Unfortunately, Mother tested positive for methamphetamine on a drug patch applied in late January 2018. She initially denied she had relapsed, but after additional test results in February were also positive, Mother admitted that she had been using methamphetamine.

In late March 2018, Mother entered a residential substance abuse program. As a consequence, her visits with A.V. were restricted to once per week, although they continued to be positive.

Meanwhile, A.V. continued to thrive in his placement and remained well connected to his de facto parents. They reported he had established loving relationships with his foster siblings and extended family, had "blossomed socially," and was making progress with his health issues. He still required regular breathing treatments, but he was beginning to sleep through the night with greater frequency than he had in the past.

By the middle of 2018, Mother had received a certificate of completion from her residential treatment program and was again visiting A.V. twice per week. However, shortly before completing her residential program, Mother again tested positive for methamphetamine. When confronted with this information, she once again denied any methamphetamine use. She had additional positive drug test results in July 2018.

SSA recommended that Mother's reunification services be terminated at the 18-month review hearing in July 2018. The court agreed with SSA's recommendation to terminate services and scheduled a section 366.26 permanency hearing for November 2018.

Following the termination of her reunification services, Mother continued to visit A.V. regularly and to participate in drug patch testing. The visits were described as "very positive," but Mother's drug testing was terminated in September after she failed to have a drug patch removed as scheduled.

Meanwhile, A.V.'s de facto parents—who had been caring for him since January 2017—reported they were enthusiastic about adopting him, that he was fully integrated into their family, and he was flourishing in their care.

In December 2018, Mother filed a petition pursuant to section 388, arguing the court should modify its order terminating her reunification services. She argued the circumstances had changed significantly because she was currently residing in a residence for parents seeking to reunify with their children, had been testing negative for drugs, and had obtained part-time employment. The court denied the petition without a hearing.

The court held the section 366.26 hearing in December 2018. The social worker testified that Mother was enjoying monitored visitation with A.V. three times per week, that she interacted with him very well, and that he was always affectionate and happy to see her. The social worker also described A.V.'s relationship with his de facto parents as very loving and nurturing, noting they had been "very vocal about wanting to keep [A.V.] in their home with them."

Mother testified that her visits with A.V. went "amazingly" well, and he was always happy to see her. She described him as being upset at the end of their visits. Mother believed he would be harmed by not having his natural parent around, as she herself had felt traumatized by separation from her biological parents as a child.

Mother denied using methamphetamine at any time since A.V. was born. She claimed she had been lying when she earlier admitted her relapse to the social worker and attributed her dirty patch testing results to environmental contamination.

At the conclusion of the hearing, the court found A.V. to be adoptable, and invited argument on the issue of whether any exception to adoption might apply. Mother argued for application of the parental benefit exception, pointing out that she had maintained consistent visitation with her son since his birth. Her counsel acknowledged that Mother “has had her struggles, . . . [b]ut one thing that has been consistent is the love that she’s demonstrated to this child, the dedication she’s demonstrated towards him in showing up and visiting with him every time she can, regardless of what’s going on in her life.” Mother’s counsel also emphasized how positive and loving those visits were, and noted that although A.V. is somewhat delayed in his speech, he calls his mother “Mom.” Based on the warmth of that relationship, Mother’s counsel argued A.V. would benefit by maintaining the relationship.

Both SSA and A.V.’s counsel disagreed with that assessment. A.V.’s counsel stressed that the sort of warm relationship that can be developed during monitored visitation two or three times per week is not sufficient to overcome the statutory preference for adoption. Instead, Mother would have to establish that her relationship with A.V. was “parental” in nature, and further that A.V. suffers its loss when he is not with her. However, counsel argued, there was no evidence that was the case. To the contrary, the evidence showed that although A.V. was always happy to see Mother, she “is not the person in his life that he looks to for stability, for nurturance, for day-to-day care.”

The court agreed that Mother had not established the parental benefit exception applied in this case. The court explained that although Mother’s testimony as to her love for A.V. was compelling, the relationship in question was “measured from the point of view of the child.” Because A.V. had been in foster care since birth, he had a

“singular attachment” with his de facto parents, and since he had never experienced even a single overnight visit with Mother, she had not established that their relationship was of the character and quality that would overcome the preference for adoption.

DISCUSSION

1. *Background Law and Standard of Review*

At a section 366.26 permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child, after reunification efforts have been terminated. “By the time of a section 366.26 hearing, the parent’s interest in reunification is no longer an issue and the child’s interest in a stable and permanent placement is paramount.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) The child has a compelling right “to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Thus, “[i]f the dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans.” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.)

However, the court, “in *exceptional circumstances*,” may “choose an option other than the norm, which remains adoption.” (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) In order to avoid the order terminating parental rights and making the child available for adoption, “a parent has the burden of proving, by a preponderance of the evidence, that one or more of the statutory exceptions to termination of parental rights set forth in section 366.26, subdivision (c)(1)(A) or (B) apply.” (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395 (*Anthony B.*).

One of the statutory exceptions applies when the court determines that “termination would be detrimental to the child,” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) However, “the exception does not

permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) Rather, “[t]he benefit to the child from continuing such a relationship must . . . be such that the relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.”” (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.)

In reviewing an order terminating parental rights, “[w]e apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child.” (*Anthony B.*, *supra*, 239 Cal.App.4th at p. 395.)

2. *The Juvenile Court’s Ruling*

In rejecting Mother’s assertion of the parental benefit exception, the court focused on the “nature of the relationship that exists.” The court explained that this case is distinguishable from one in which dependency jurisdiction had been established at some later point in the child’s life, after a significant parent-child relationship had already been formed. In such a case, the court noted, “one could well imagine . . . that the termination of that relationship would be inappropriate.” By contrast, “the parent that does not have custody . . . is at a disadvantage” in establishing the kind of relationship that would outweigh the advantages of adoption. And in this case, the court noted that A.V. has “been in foster care since birth,” and “the singular attachment seemed to be with the foster care providers.”

We can find no error in that analysis. For the parental benefit exception to apply, the bond between the parent and child must be viewed as parental in nature, rather than the type of connection a child might develop with a friendly visitor or non-parent

relative, such as an aunt or uncle. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) “The significant attachment from child to parent results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

As explained in *In re Jasmine D. supra*, 78 Cal.App.4th at p. 1350, the parental benefit exception is applicable when the court concludes the parent is fulfilling that unique role for the child: “a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.”

It is not enough for Mother to establish that her visits with A.V. have been consistent and positive, and that he is happy to see her and sad when she leaves. Her burden was to demonstrate that her relationship with A.V. was of such significance to him that the benefit of maintaining that relationship outweighed the substantial benefits that would flow from him being adopted. *In re Angel B., supra*, 97 Cal.App.4th at p. 465, underscores that point: “The parents in this [foster] family clearly, by deed if not by name, were Angel’s parents. They, not Mother, provided Angel with all the day-to-day, hour-by-hour care needed by a helpless infant and then growing toddler. Thus, although Mother’s petition states that she has bonded with Angel, and that Angel is happy to see her and reaches for her on their visits, such visits, in total, add up to only a tiny fraction of the time Angel has spent with the foster parents. On this record, no reasonable trier of fact could conclude that the bond, if any, Angel feels toward Mother (as opposed to the bond that *Mother* feels toward Angel) is that of a child for a parent.”

Rather than addressing the significance of the bond between A.V. and his de facto parents, Mother asks us to consider five published cases in which the appellate court concluded that the juvenile court’s rejection of the parental benefit exception was

erroneous. But all of those cases are distinguishable on the very point highlighted by the juvenile court in this case. In each of them, the dependent child was raised by the natural parent for some significant period of time before the parent lost custody. (See, *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207 [“At the time of the section 366.26 hearing, Jerome was nearly nine years old. He had lived with Mother for the first six and one-half years of his life and expressed his wish to live with her again”]; *In re Amber M.* (2002) 103 Cal.App.4th 681, 684 [the three children were “almost five years old, two and one-half years old, and seven months old” when removed from parental custody]; *In re S.B.*, *supra*, 164 Cal.App.4th at p. 293 [child was three years old when removed from parental custody]; *In re Scott B.* (2010) 188 Cal.App.4th 452, 455, 462 [Scott, who was seven years old when removed from parental custody, “made it clear that he did not want to be adopted and if the adoption were to occur he would run away”]; and *In re E.T.*, *supra*, 31 Cal.App.5th at p. 77 (*In re E.T.*) [“At four years old, [the twins] have spent almost half their lives with Mother”].)

Mother argues that *In re E.T.* is most relevant because like the children in that case, “[A.V.] was also of tender years . . . and here too mother was a contact [sic: constant] parental figure in his life during the weekly visits” But the significant factor in *In re E.T.* is not that the children were young, or even that the mother had engaged in consistent visitation (although that is a required element to establish the parental benefit exception). What is most significant in *In re E.T.* is that the juvenile court found “the children are ‘very tied to their mother,’” who had parented them for two years before they were removed from her custody. (*In re E.T.*, *supra*, 31 Cal.App.5th at p. 77.)

There was no comparable finding here. Instead, the court made clear that because Mother had never parented A.V., and had never been responsible for caring for him for a single night in his entire life, she had not established the type of parental

relationship that would overcome the statutory preference for adoption. *In re E.T.* therefore offers no assistance to Mother.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.